IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.01.2007

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

W.P.No.27930 of 2006
and
M.P.No.1 of 2006

G.Anandan ... Petitioner

Vs.

1. The Joint Commissioner of Police,
Traffic Zone, Vepery, Chennai-7.

2. The Deputy Commissioner of Police,
Traffic (North), Chennai-7. ... Respondents

PRAYER: This writ petition is filed under Article 226 of the Constitution of India to issue a writ of mandamus, calling for the records in connection with the proceedings issued in C.No.15/PR/SRP/99 TZO.No.266/06 C.No.158/9036 - A/TR.PR(N)/06 dated 20.07.2006 and Tha.Pa.No.15/99 Rule 3(Aa) passed by the 2nd respondent and C.No.5/AP/TR.PR(N)/2006 dated 12.08.2006 passed by the 1st respondent and to quash the same and consequently direct the respondents to reinstate the petitioner into service with all benefits.

For Petitioner : Mr.S.Ilamvaludhi

For Respondents : Mr.D.Srinivasan, G.A.

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O R D E R

The issue involved in this case is as to whether the order of removal passed by the second respondent dated 20.07.2000 and subsequent confirmation of the same by the first respondent dated 12.08.2006, is disproportionate to the charge framed against the petitioner. The petitioner joined service as a Police Constable and completed more than 15 years of service. While working in the control room traffic on 03.11.1998 he was forced to go on leave but before expiry of 60 days, he has reported duty and continuing the same.

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2. On 05.03.1999 a charge was framed against the petitioner that he has absented from duty from 03.11.1998 and the Enquiry Officer in the enquiry report dated 24.05.1999, found the charges proved against the petitioner. For the charge framed under Rule 3(b) of the Police Subordinate Service Rule, he has submitted his explanation on 22.05.1999 and the second respondent after enquiry has passed the order of removal on 20.07.2006 which was confirmed by the first respondent on 12.08.2006.

3. It is the case of the petitioner that in respect of desertion, removal from service is a disproportionate punishment. It is also the case of the petitioner that as per circular issued by the Commissioner of Police, Chennai, dated 05.12.1990 in cases of deserters, who were reinstated, after they appeared before the Deputy Commissioner of Police, within the time limit of 60 days, they should be punished only under Rule 3(a) of the Tamil Nadu Police Subordinate (Discipline and Appeal) Rules, for unauthorized absence from duty by imposing minor penalties.

4. The learned counsel for the petitioner would also bring to the notice of this Court, that a reference to the charge memo shows that the petitioner who is stated to have deserted on 03.11.1998, on the 59th day, namely, on 31.12.1998, has reported before the Superintendent of Police and being satisfied about the medical certificate, he was taken into service and therefore, on the basis of the circular stated above, it should be referred only under Rule 3(a) and not 3(b). Even the enquiry report also specifically states that when the petitioner has absented on 03.11.1998, on the 59th day he has reported duty, namely, on 31.12.1998 and he was permitted to join duty and therefore, it such a case, removal from service is disproportionate to the charge.

5. On the other hand, it is the case of the respondents as it is seen in the counter affidavit that on an earlier occasion also for nearly 12 times it was noticed that the petitioner has deserted the service. Earlier also on 29.09.1998 he was removed from service by the Deputy Commissioner of Police Traffic North and the appeal was rejected by the Additional Director General of Police and ultimately as per the order the Tribunal in O.A.No.5357 of 2000 dated 04.04.2002 the petitioner was reinstated. According to the respondents, the circular dated 05.12.1990 is only an executive instruction it was based on the latest instruction of the Director General of Police, dated 02.11.2005 the petitioner was removed from service.

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6. According to the respondents, on various occasions including the period between 16.10.1999 to 26.04.2002 the petitioner has been remained out of employment and therefore, he is a regular deserter, who does not require any sympathy, especially in the disciplined force like that of the police force.

7. The learned counsel for the petitioner Mr.S.Ilamvaludhi, would submit that when once the circular issued by the Commissioner of Police dated 05.12.1990 is clear that in case of desertion the charge should be under Rule 3(a), the punishment of removal is harsh. According to him, the contents of the counter affidavit that based on the subsequent instruction issued by the Director General of Police, dated 02.11.2005, the petitioner was removed from service is untenable. According to him, the charges leveled against the petitioner in this case is dated 05.03.1999 and therefore, even assuming that an instruction has been issued by the Director General of Police on 02.11.2005, the same cannot be made applicable to the facts and circumstances of the case. The cause of action should be construed on the date when the occurrence is stated to have taken place, based on which the charge has been framed and in the present case when it was in 1999 and therefore, the circular issued on 02.11.2005 cannot have any application.

8. According to the learned counsel for the petitioner, the appellate authority has not taken anything into consideration at all, except to say in a single line that the punishment is not harsh and there is no discussion about any of the facts.

9. The learned counsel also would rely upon the judgement of the Hon'ble Apex Court in AIR 1999 SC 3367 and also other judgement namely, AIR 1994 SC 215 apart from 1996(7) SCC 634 to substantiate his contention that in cases of awarding of disproportionate punishment, the court is empowered to modify the same. He would also rely upon the judgement rendered by this Court in J.Patric Vs. Government of Tamil Nadu, rep. by its Secretary, Chennai-9 and others dated 06.09.2006 in W.P.No.24701 of 2006. That was also a case wherein a Police Constable was not in duty more than 21 days without prior permission and an order of compulsory retirement was passed and analyzing the factual position and also the legal grounds raised, I have remitted the matter back to the respondents by setting aside the order of punishment of compulsory retirement for imposing appropriate punishment to the petitioner therein.

10. In the present case, factually it is clear that the petitioner, who has absented on 03.11.1998 has reported before the Superintendent of Police on 59th day, namely, on 31.12.1998 and on

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referring to the medical certificate and also fitness certificate, he was also taken back to job. In the context of this factual situation, it is relevant to point the circular issued by the Commissioner of Police, dated 05.12.1990. It was by that circular the Commissioner has stated that in respect of disciplinary proceedings regarding deserters reinstated into service after they appeared before the Deputy Commissioner of Police within the time limit of 60 days, it should be taken as unauthorized absence from duty under Rule 3(a) of the Tamil Nadu Police Subordinate Services (Discipline and Appeal) Rules, and directed to impose minor penalties.

11. However, the respondents have taken a stand as it is seen in the counter affidavit that it amounts to executive instruction and that cannot supersede the statutory rules. On the other hand, in the same counter affidavit, the respondents specifically state that the punishment of removal against the petitioner has been passed based on the latest instructions of the Director General of Police of Tamil Nadu in D.O.Lr.C.No.AP I(1)/223597/2005 dated 02.11.2005. While on the one hand the respondents have chosen to state that the earlier circular issued by the Commissioner of Police dated 05.12.1990 is executive instruction, it is not known as to how the subsequent letter of the Director General of Police dated 02.11.2005 can have a statutory force.

12. In any event in the present case, the petitioner is facing the charge, which was dated 05.03.1999 in respect of the alleged desertion from duty on 03.11.1998 and therefore, even assuming that there has been any instruction from the Director General of Police dated 02.11.2005, there is no difficulty to arrive at a conclusion that such instruction cannot be made applicable as far as the facts of the present case is concerned. Therefore, there is certainly substance in the argument of the learned counsel for the petitioner basing reliance upon the circular of the City Police Commissioner, dated 05.12.1990.

13. The further contention raised on behalf of the respondents that the petitioner is in the habit of absenting himself, is not relevant for the simple reason that even admittedly as it is seen in the counter affidavit, actions were taken earlier and at the intervention of the Tribunal, the action were dropped and it cannot be said as if it can be a ground for the purpose of imposing a major punishment.

14. In any event a reference to the order of the second respondent, namely, original authority dated 20.07.2006 as well as the appellate authority, namely, the first respondent dated 12.08.2006 shows that the respondents have not chosen to apply their

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mind for the purpose of giving a proper reason. In fact except stating that the respondents are accepting the enquiry report, there is no independent application of mind by the second respondent being the original authority. It is no doubt true that the judgement of the Hon'ble Apex Court reported in AIR 1999 SC 3367 rendered in Syed Zaheer Hussain Vs. Union of India and others has held that the punishment of the dismissal can be substituted by lesser punishment with reinstatement with 50% cutoff back-wages and also in a subsequent judgement rendered in Pritham Singh Vs. Union of India and others reported in JT 2004(7) SC 576, wherein also the order of compulsory retirement was set aside.

15. In a similar circumstance, the Hon'ble Apex Court in the judgement rendered in Union of India and others Vs. Giriraj Sharma reported in AIR 1994 SC 215, has also set aside the order of dismissal directing reinstatement into service with monetary benefits, leaving it open to the department if so desire to visit the petitioner with minor punishment.

16. In this regard it is relevant to point out the undertaking given by the petitioner in the affidavit filed in support of writ petition that his family problems were enormous and the same has been settled now. The order of removal from service passed by the respondents against the petitioner dated 21.07.2006 and confirmed on 12.08.2006 are set aside. The matter is remitted back to the first respondent for the purpose of deciding about the appropriate punishment in the light of the discussions stated above with a strict warning to the petitioner not to repeat the same and if repeated the same will be viewed seriously and on the basis of explanation submitted by him and pass appropriate orders within a period of 4 weeks from the date of receipt of a copy of this order. The writ petition stands allowed in the above terms.

No Costs. Consequently, the connected M.P.is closed.

nbj

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Joint Commissioner of Police,
   Traffic Zone, Vepery, Chennai-7.

2. The Deputy Commissioner of Police,
   Traffic (North), Chennai-7.

+ 1 cc to Mr. S. Ilamvaludhi, Advocate SR No. 506/07

JRG(CO)
SR/10.1.2007

order in
W.P.No.27930 of 2006

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